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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1975

NO. 75-1811

IN RE NICHOLAS R. ALLIS

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Los Angeles, CA 90012
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on March 10, 1976 and on May 17, 1976.

ORDER BELOW

The orders of the Court of Appeals for the Ninth Circuit, not yet reported, appear in Appendix A and B, attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered March 10, 1976. Petition for rehearing with suggestion for rehearing en banc was denied on May 17, 1976. The jurisdiction of this court is invoked pursuant to 62 Stat. 928, 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether in a criminal contempt proceeding, the requirements of due process as guaranteed by the Fifth Amendment, United States Constitution and Rule 42(b) of the Federal Rules of Criminal Procedure are fulfilled when petitioner is given ten minutes to consult with counsel and prepare a defense, is not given notice of specific dates of prior tardiness, and is not notified that he is being charged with "deliberate and intentional" breach of his duties.
2. Whether evidence was sufficient to support finding of contempt when no evidentiary hearing was held, and record did not support finding of deliberate and intentional breach of or reckless disregard of duties.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Rule 42(b), Federal Rules of Criminal Procedure:

> Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules.

> If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

I.

STATEMENT OF THE CASE

Petitioner, a deputy federal public defender for the Central District of California, [hereinafter petitioner or the attorney] was held in contempt for being twenty (20) minutes late to a sentencing on March 6, 1974. After the attorney arrived in the courtroom, the court advised him that he was "in imminent likelihood of being found in contempt" of court and gave him ten minutes to consult with his supervisor, another attorney.

At the conclusion of the recess the court noted that the attorney had not been on time on more than one previous occasion in that courtroom. During his two years as a deputy federal public defender, defendant on two

instances, occurring during the week of July 17, 1973, did not appear at the time scheduled. He was admonished on one of the two occasions. Between the week of July 17, 1973 and the March 6th, 1974, incident, defendant had appeared sixteen times in the courtroom. Proper and timely appearances were made on all these occasions and on all occasions prior to the week of July 17, 1973. When called upon to tell the court what excuse he had, the attorney stated that he did not have an excuse, that the tardiness was his fault. He had marked it on his calendar on March 4, and had taken the file to his secretary on the morning of March 6 and asked her to remind him of the appearance. [R.T. 4, 5][1/] However, he

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1/R. T. refers to the transcript of the March 6th proceeding attached by the court of appeals to its opinion.

had begun a retrial of a case in another courtroom of the United States District Court that morning, had spent the noon hour preparing for witnesses and in his preoccupation with the trial, forgot about the sentencing and went to the courtroom where the trial was being held at approximately 1:15. [R.T. 5,6; C.T. 7][2/]

The attorney's supervisor then was asked if he had anything to say. He stated that he was appearing almost as a "charcter" witness" and that the attorney "has made a truly conscientious effort to make court appearances and try to administer his calendar and not cause the inconvenience I think he knows he has caused the court today. . . .

2/ C.T. refers to Clerk's Transcript on Appeal.

"So I think that as to his intention, I know clearly it was not an intentional situation. It was a mistake, and a bad one. . . ." [R.T. 6-7]

Immediately thereafter the court found the attorney in "direct contempt of this court" and fined him $100.00. [R.T. 8]

Subsequently the court issued an "Order Holding Counsel in Contempt of Court". [C.T. 1] In that Order, the court concluded that "Said failure to appear was without any justification or good cause and was a deliberate and intentional breach of said Nicholas Allis' obligations to the Court and constituted contempt of court."

Subsequently, on March 15, 1974, defendant filed a Motion to Vacate Order Holding Counsel in Contempt of Court. [C.T. 3] In an attached affidavit, petitioner reviewed his record of appearances in the

courtroom involved in this case. He recounted in detail his substantial efforts after the unfortunate week of July 17, 1973, to revamp his calendar system and his system of notifying courts.

He began to arrive at the office on Monday mornings one hour earlier than he had previously. During that hour, he reviewed every case in his file in order to check all appearances for that week. He also began to note each appearance in his own separate calendar in addition to the calendar kept by his personal secretary and the calendar kept for the entire office staff. In addition, he began to make it a practice to notify the court clerks personally of all conflicting court appearances instead of relying solely on his secretary to notify them. He also stated that on the day in question he had

taken the file to his secretary in the early morning and told her to note the appearance on her calendar, saying "Don't let me forget this". During the morning he started a jury trial in the courtroom of another judge of the United States District Court. That trial was a retrial of a bank robbery, and petitioner was deeply concerned and preoccupied with the trial. He spent the noon hour reviewing statements of witnesses with a law student. Because of his preoccupation with and concentration on this jury trial, he forgot about the sentencing and was not reminded of it by anyone. At approximately 1:15 p.m., he proceeded to the courtroom where the trial was taking place and was seated at counsel table talking to the accused when a secretary in his office entered the courtroom. He immediately remembered the

appearance in the other courtroom and proceeded directly to that courtroom arriving there at 1:35p.m.

Petitioner's affidavit concluded with the statement that his tardiness "was the result of lapse of memory and preoccupation with another case. It was not in any manner willful; I meant no disrespect whatsoever to the court and regret any inconvenience or difficulty I may have caused by my conduct." [C.T. 8]

The court denied petitioner's motion to vacate its order and also denied petitioner's motion to stay payment of the $100.00 fine. Notice of Appeal was filed March 15, 1974.

On March 10, 1976, a panel of the United States Court of Appeals for the Ninth Circuit with one judge dissenting, affirmed the order holding defense counsel in contempt of court. The majority found

that the trial court had erred in denominating the procedure a direct contempt of court punishable summarily pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure. Nevertheless, the majority held that the court's comments and the ten minute recess satisfied the procedural requirements of Rule 42(b). Petition for rehearing with suggestion for rehearing en banc was denied on May 17, 1976.

REASONS FOR GRANTING THE WRIT

1a. This case presents an important question regarding the sufficiency of due process in a criminal contempt proceeding as guaranteed by the Fifth Amendment to the United States Constitution and Rule 42(b) of the Federal Rules of Criminal Procedure.

A finding of contempt constitutes a criminal conviction. Bloom v. Illinois, 391 U.S. 194, 201 (1968). The seriousness of a contempt conviction with its lifelong consequences, particularly in the case of an attorney, requires that procedural safeguards be strictly observed. See Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

The dissenting opinion to the Court of Appeals opinion rightly states,

"The time given within which to

prepare a defense was patently inadequate. A ten minute recess and a quick consultation with another lawyer is insufficient to permit a defense to be made to a charge that Mr. Allis was habitually late or, at least had been late without justifiable excuse on other occasions. (See, e.g. United States v. Alter (9th Cir. 1973) 482 F.2d 1016, 1023)." App. 24-25.

Petitioner was unable in ten minutes within which to research the law of contempt, to determine the requisite elements and possible defenses, to secure counsel and to prepare his defense.

That he had a defense which he could have presented if given a reasonable

opportunity is established by the affidavit petitioner submitted a few days later as part of his motion to vacate the order holding him in contempt. [C.T. 3] His lack of willful or reckless disregard of the court's order could have been established through the presentation of records and witnesses showing that he was engaged in the retrial of a bank robbery in another courtroom and was preoccupied with that case, that he worked on that case through the lunch hour with a law student and proceeded with the student to the other courtroom at approximately 1:15, that he appeared shocked and surprised when a secretary entered the courtroom to remind him of the appearance, that he had notified his secretary that morning of the appearance and asked her to remind him of it but she did not do so.

With reasonable time to prepare a defense, petitioner also could have established his perfect record of attendance in the courtroom during the one year four months he had worked as a public defender prior to the week of July 17, 1973 and his perfect record of attendance during the seven and a half months between the week of July 17, 1973, and March 6, 1974, when this incident took place.

Moreover, he could have presented witnesses and records to establish the reasons he had been tardy during the week of July 17, 1973, and the unusual efforts he had made to revamp his calendar system subsequent to the week of July 17, 1973.[3]/

3/ He could also have established that he had not been admonished on more than one occasion, contrary to the finding of the district court in its oral and written orders holding defendant in contempt.

All of this material was relevant and crucial to establishing that petitioner failure to appear did not constitute "deliberate and intentional" conduct as found by the district court or "reckless disregard of his responsibilities as an attorney" as found by the court of appeals.

However,petitioner was not able to present this evidence because he was given only ten minutes time for preparation.[4/]

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4 / The length of time petitioner was granted was particularly inadequate, when the likely state of mind of petitioner is considered: petitioner had just been informed he was about to be convicted of contempt,this coming during a recess in a jury trial in another courtroom. The likelihood of calm,reasoned judgment during a ten minute recess in these circumstances is small,as best illustrated 1)by the fact that petitioner after reflection and research,was able to submit a motion vacating the order,which outlined a substantial defense 2)by the fact that during the "hearing" petitioner admitted the sentencing had been set at his "special request" when in fact it had not been.[See March 4th transcript at 3].

Petitioner was not represented by counsel, contrary to the opinion of the majority. During the ten minutes, he conferred with his supervising attorney, but the supervisor did not represent him. The district court stated it would recognize the supervisor who stated he was appearing "almost as a character witness".

The effect of what the dissenting opinion characterizes as a "patently inadequate" time to prepare a defense was to make it impossible for petitioner to secure an attorney, review the law of contempt, construct the defense that he, in fact, possessed, and indeed to do anything other than make the brief "statement", for which preparation the district court had stated it was calling the ten minute recess.

1(b) Rule 42(b) requires that the notice shall "state the essential facts constituting the criminal contempt charged and describe it as such." The Fifth Amendment requires as much.

The dissenting opinion correctly observes that,

> "Although the 'simple notice' required by Rule 42(b) is to be judged with less strictness than a formal indictment

/ / /

/ / /

> [citations ommitted], due process as well as the rule require that it contain enough to inform [the alleged contemnor] of the nature and particulars of the contempt charged." (United States v. Robinson, 9th Cir. 1971 449 F.2d 925). The informal statement from the bench did not meet the requirement of particularity. The district court noted that Mr. Allis was [20] minutes late on this occasion and that on some other occasions he had also been late. The "notice" specified no dates of the prior tardiness. Yet, the conduct on prior occasions

was necessarily in issue.
The informal notice thus did
not meet the simple standards
of Rule 42(b). (United States
v. Robinson, supra.)"
Appendix A-23-24.

It was not until after petitioner had been held in contempt that he was able to reflect on and to research his record of appearances in the courtroom. His motion to vacate the order holding him in contempt filed nine days later shows that in analyzing his record of appearances, as well as the law of contempt, he was able to establish that he had a defense to the charge of contempt, the outlines of which are set forth as part of his motion. The lack of notice as to the essential facts underlying the charge, particularly when combined with the inadequate recess of ten

minutes, made it virtually impossible for petitioner first, to determine whether he had a defense and second, to present the defense.

Moreover, petitioner never was notified that he was charged with a "deliberate and intentional breach" of his obligations to the court, as the court later stated in its written order. The circumstances of this case, including the fact that petitioner was granted only a ten minute recess to prepare a defense, required the court to at least notify the petitioner that the offense of contempt required a finding that defendant acted willfully or recklessly. Only with such information could petitioner even begin to prepare a defense.

2(a) The evidence was insufficient to support a finding of contempt. First, the informal exchange between court and counsel

cannot be deemed evidence of an admission. The dissenting opinion properly notes that,

> "The district court did not purport to rely on Rule 42(b), and the record fails to support the decision that the procedure followed complied with Rule 42(b). No evidentiary hearing was held, no witness was sworn, and no testimony was received. The evidence consisted solely of the facts that the time set for Allis's appearance was March 6, 1974, at 1:15 p.m., and he did not appear until 1:35 p.m. on that date.

The majority correctly assumes that a finding of contempt under Rule 42(b) could

not be sustained based only on evidence that a forgetful lawyer was [20] minutes later for a court appearance. The lawyer would be negligent, but his conduct could not be deemed a reckless disregard of his responsibilities as a lawyer nor a wilful disobedience of a court order. The majority concludes that Mr. Allis's unsworn statement that he had been late on some other unspecified occasion or occasions bridged the evidentiary gap. I do not think that the informal exchange between the

district court and Mr. Allis can be deemed evidence or even an admission in this Rule 42(b) context." App. 21-23.

The formalities of accepting legal evidence from witnesses placed under oath as well as other procedural rights cannot be dispensed with merely because the petitioner is an attorney and the crime is contempt, or because, as the court of appeals suggests, the end in view is the salutary one of focusing the attention of the attorney on being prompt. The conviction of petitioner of this crime carries with it consequences, particularly those affecting defendant's reputation and standing as a member of the bar, just as serious as the consequences suffered by many criminal defendants, and he should be

accorded traditional procedural rights.

2(b) Second, the information before the court was insufficient to sustain a conviction for contempt.

Even if petitioner's statement of previous tardiness was an adequate substitute for formal admissions or testimony, evidence was lacking of reckless behavior or intentional disregard of his responsibilities. Petitioner recounted his involvement and preoccupation with a jury trial which had begun that morning and his consciencious efforts to remember the appearance, including asking his secretary that morning to remind him of it. The only specific mention of "intent" from either the court or the defense came from defendant's supervisor, Mr. Van de Kamp, who stated, "I know clearly it was not an intentional situation. . . ." The information before the court was insufficient

to sustain a conviction for reckless disregard of an attorney's obligations.

2(c) Third, the district court in its written order holding petitioner in contempt found that petitioner's tardiness of twenty minutes was a "deliberate and intentional breach" of his "obligations to the court". The district court did not charge and did not find petitioner guilty of reckless behavior. However, the majority of the court of appeals holds that the information "warrant[s] a finding of reckless disregard of his responsibilities as an attorney."

Since the district court found the petitioner guilty of willful and deliberate conduct, the court of appeals could not sustain the conviction upon its finding of reckless conduct. The failure of the evidence to sustain the district court's

finding of willful conduct warranted reversal of the conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

NICHOLAS R. ALLIS
Deputy Federal Public Defender

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE NICHOLAS R. ALLIS, Appellant.	)	NO. 74-1695
	)	O P I N I O N

On Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and SNEED, Circuit Judges, and THOMPSON*, District Judge

THOMPSON, District Judge:

This is an appeal from an order holding defense counsel in contempt of court for tardiness. Annexed to this opinion is a transcript of the proceedings which states with precision exactly what occurred.

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* Hon. Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

APPENDIX A

The court's oral adjudication was followed by a written order filed March 6, 1974, which parroted the oral findings in all material respects. The written order contains the following preface:

> "After notifying Nicholas Allis, Esq., of the nature of the proceeding and after affording him an opportunity to consult with counsel and an opportunity for himself and counsel to be heard, the court finds said Nicholas Allis, Esq., to have been in direct contempt of court and certifies that the court saw and heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

Thereafter, Allis filed a motion to vacate the contempt order and the motion was denied. This appeal followed.

It is probably too late for an effective argument that tardiness of counsel is punishable summarily under Rule 42(a), Federal Rules of Criminal Procedure, as conduct committed in the

actual presence of the court. Persuasive appellate court opinions have sustained the view that it is not counsel's absence from the courtroom at the appointed hour which constitutes the contempt, if any. Sykes v. United States, 444 F.2d 928 (D. C. Cir. 1971); In Re Lamson, 468 F.2d 551 (1st Cir. 1972); United States v. Willett, 432 F.2d 202 (4th Cir. 1970); United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973). The import of these cases is that the contempt consists not in the absence from the courtroom but in the reasons for the attorney's presence elsewhere, and the presence elsewhere was, of course, not in the actual presence of the court, a requirement for summary disposition under Rule 42(a), Federal Rules of Criminal Procedure. The absence-presence contention has its fascinating aspects.

We, nevertheless, agree with the conclusion reached in the Delahanty case, supra:

> "We find that this matter should not have been dealt with summarily. While the absence of Appellants was obvious to the court, the reasons for their absence were not. The court did provide an opportunity for an explanation of their absence, but only after the court had found Appellants to be in contempt. As the Supreme Court has stated, summary disposition of contempt under Rule 42(a) is '"for exceptional circumstances" * * * such as acts threatening the judge or disrupting a hearing or obstructing court proceedings.' Harris v. United States, 382 U.S. 162, 164, 86 S.Ct. 352, 354, 15 L.Ed.2d 240 (1965). We find no exceptional circumstances in this case justifying summary disposition." Delahanty, supra, at 498.

The Government relies primarily on In Re Gates, 478 F.2d 998 (D.C. Cir. 1973), and In Re Niblack, 476 F.2d 930 (D.C. Cir. 1973), which reject the Sykes and Willett, supra, rationale and proclaim tardiness of

counsel to be summarily punishable as direct contempt in the actual presence of the court. With this conclusion we respectfully disagree.

Absence (tardiness) alone is not contempt. The reasons for the default are important. A contempt is a wilful disregard or disobedience of public authority and the requisite wrongful intent may be inferred from an attorney's reckless disregard of his obligations to the court. Sykes, supra, at 930; Delahanty, supra, at 398. If an explanation for tardiness is made which is inconsistent with wilful disobedience, a hearing must be held, if the facts are disputed, or, if the explanation is accepted there is no contempt.

So, to the extent the district court relied upon Rule 42(a) for summary adjudication of misconduct in the actual

presence of the court, we believe it was in error. But the district court did not rely solely upon Rule 42(a). It notified Allis of the charges and afforded him the opportunity to consult with counsel and an opportunity for himself and counsel to be heard. The issue is whether this procedure was consonant with the requirements of Rule 42(b), Federal Rules of Criminal Procedure, which provides:

> "(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by

> jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

A "reasonable time for the preparation of the defense" varies with the circumstances. Presumably, no one would contend that a witness who fails to respond to a subpoena, or a juror who fails to respond to a summons, would not be entitled to more than ten minutes' notice of the charges to prepare a defense. But here we are dealing with an attorney at law, an officer of the court. We are concerned with the efficient administration of the court's business, which is a responsibility of the attorney as well as

of the judge. Here, the court, at the outset, notified Allis that there was imminent likelihood that he would be held in contempt. He told him that the sentencing of Spencer had been set for 1:15 o'clock p.m. at Allis' special request. Allis agreed. He told him that Allis had been tardy on previous occasions and had been strictly admonished. Allis agreed. A recess was then taken for ten minutes and Allis conferred with counsel, who appeared with him at the subsequent hearing. When the court asked him what his excuse was for failure to meet the commitment at a time set at "your own instance and for your own convenience," Allis replied: "I don't really have an excuse * * *. It was my fault * * *. I did forget it."

This was sufficient to warrant a finding of reckless disregard of his res-

ponsibilities as an attorney and to justify the adjudication for contempt. The procedures were in conformity with the requirements of Rule 42(b). No extension of time to prepare a defense was warranted in these circumstances and none was requested by Allis or his counsel. The facts were clear and undisputed. At no time was an indication given of the availability of other witnesses or evidence to support a defense of justification or excuse.

On the facts, the instant case is similar to In Re Niblack, 476 F.2d 930 (D.C. Cir. 1973), in which the lawyer's tardiness, which was not an isolated instance, was held summarily punishable as a direct contempt in the actual presence of the court. While we have disapproved the analysis by the Niblack Court, we do

approve the result. We discern no justification under the circumstances disclosed by this record and the Niblack opinion for requiring an elaborate proceeding when the only end in view is to get the attorney, as an officer of the court, to focus some attention on the importance of being prompt and of devising a system which will avoid tardiness and complicating delays in the administration of the business of the court.

Affirmed.

LOS ANGELES, CALIFORNIA, WEDNESDAY, MARCH 6, 1974, 1:15 P.M.

THE COURT: Good afternoon, gentlemen.

THE CLERK: Criminal Case 74-295-IH, United States of America vs. James Edwin Spencer.

Will counsel please make their appearance.

MR. VON DER AHE: Good afternoon, your Honor. Vincent Von Der Ahe appearing on behalf of the Government.

THE COURT: I see Mr. Spencer is here. Where is Mr. Allis, your counsel? Do you know?

DEFENDANT SPENCER: No, I don't, sir.

THE COURT: Has anyone heard from him? Mr. Clerk, have you?

THE CLERK: No, your Honor.

THE COURT: How about you, Mr. Von Der Ahe?

MR. VON DER AHE: No, I have not,

your Honor.

THE COURT: Let the record show that it is now 1:22. The case was set for 1:15. My secretary called his office at 1:15 and was told that he was on his way down here.

I have no alternative but to recess until the gentleman appears. We will give him a minute or two.

Go ahead and sit down, Mr. Spencer.

It is 1:25. We will be in recess.

(Recess).

THE COURT: For the second time call the case.

THE CLERK: Criminal Case 74-295-IH, United States of America vs. James Edwin Spencer.

Counsel, please make your appearances.

MR. VON DER AHE: Good afternoon, your Honor. Vincent Von Der Ahe appearing for the Government.

MR. ALLIS: Good afternoon, your Honor. Nicholas Allis for Mr. Spencer. I apologize for being late.

THE COURT: We will discuss that later, Mr. Allis. The court has been out once. The matter was set for 1:15 at your special request, as I remember it.

MR. ALLIS: Yes, it was, your Honor.

THE COURT: And the clerk indicates that you failed to arrive until 1:35.

Now, first, let's proceed to the matter at hand.

* * * * * *

THE COURT: Now, Mr. Allis, I correctly stated the facts, have I not?

MR. ALLIS: Yes, you have, your Honor.

THE COURT: Mr. Allis, one other fact needs to be placed in the record, namely, as I recall it, that you had not been on

time more than once heretofore in this court, and on at least one, if not all of those prior occasions, were admonished in the most strict terms that scrupulous promptness was a lawyer's obligation.

Is that not a fair statement of the history?

MR. ALLIS: Yes, it is.

THE COURT: I therefore must tell you that you now stand in imminent likelihood of being found in contempt of this court. I will hear whatever you wish to say. If you wish to consult with another counsel, I will allow a reasonable time for that.

I see Mr. Van De Kamp has just entered the courtroom. If you desire a recess before making any statement, I will, of course, afford you that now that you are on notice as to the scope and possible outcome of this proceeding.

MR. ALLIS: Yes. I desire a recess, your Honor.

THE COURT: Ten minutes.

(Short recess)

THE COURT: Mr. Allis, come forward.

I will be happy to recognize Mr. Van De Kamp to speak on your behalf, or in any other capacity that he wishes to be heard, if he wishes to be heard.

Will you be good enough, first of all, to tell me what if any excuse you have for your failure to meet this commitment today at a time set at your own instance and for your own convenience.

MR. ALLIS: Well, I don't really have an excuse, your Honor. It was my fault. I did forget it. I had it marked on my calendar. I went in with the file this morning to my secretary. I asked her to remind me of it. I spent the whole lunch

hour up in my office preparing for the case in Judge Ferguson's court. I didn't think of this case during the noon hour like I thought of it when I came into the office this morning.

And I left to go down to Judge Ferguson's court about 1:17, and I have been there sitting at the defense counsel table preparing that case since then.

THE COURT: Mr. Van De Kamp, do you desire to be heard in any respect?

MR. VAN DE KAMP: Only to say this, your Honor -- maybe I appear almost as a character witness. I know Mr. Allis had a prior experience in this court.

THE COURT: More than one.

MR. VAN DE KAMP: I recall that experience as a number of months ago. That, to my knowledge, was the last, I think, severe problem that he has had with the

court. And I think he has made a truly conscientious effort to make court appearances and try to administer his calendar and not cause the inconvenience I think he knows he has caused the court today.

THE COURT: This is more than inconvenience, Mr. Van De Kamp. The cost to the public treasury is immense. I can go through the list of people who were sitting here waiting his appearance for the better part of half an hour, but it is not necessary. The marshal, the prosecutor, the probation officer, the reporter, the clerk, the bailiff, and the court in chambers, unable to put his mind to anything else because he anticipated being able to handle this case.

MR. VAN DE KAMP: I understand that, your Honor; and I think Mr. Allis does probably more than he might indicate today.

First, I don't think it was intentional. I think Mr. Allis has stated his case honestly to the court. The last thing in the world he needs at this point is to get into this kind of difficulty again. And I think he is very conscious his status with the court is severely jeopardized when he didn't make these appearances. And he has a boss to be concerned with in the office.

So I think that as to his intention, I know clearly it was no an intentional situation. It was a mistake, and a bad one, but --

THE COURT: Well, --

MR. VAN DE KAMP: I would ask the court to be --

THE COURT: I don't think we can run a system of justice without from the lawyers at least the recognition, and a proper

recognition, of their responsibilities to the court. I don't think that we can serve the public and the public treasury without making it crystal clear to lawyers, who are officers of the court and are guilty of serious breaches of their obligations to the court, that they must be prepared to take the traditional consequences of those serious breaches.

This is not the first time. It if were, I would not be inclined to hold this counsel in contempt, because I would have felt that a stern warning ought to be applied in the interest of compassion. But that stern warning, Mr. Van De Kamp, has been given to this lawyer more than once, and in the strongest terms I could manage. And if that has not had an effectiveness, I must either abdicate the job I hold or do something else in the tradition of the

profession. And I do not intend to abdicate the job I hold or the standards to which I think members of a profession, of which I am proud to be a member, are required to adhere.

So, Mr. Allis, I find you in direct contempt of this court. I fine you the sum of $100. And that fine shall be paid within one week from this date.

Court is adjourned.

- - -

HUFSTEDLER, Circuit Judge (concurring and dissenting):

I agree with the majority opinion's holding that Mr. Allis's tardiness could not be summarily punished under Rule 42(a) of the Federal Rules of Criminal Procedure. I dissent from the majority's conclusion that the contempt order can be upheld under Rule 42(b).

The district court did not purport to rely on Rule 42(b), and the record fails to support the decision that the procedure followed complied with Rule 42(b). No evidentiary hearing was held, no witness was sworn, and no testimony was received. The

evidence consisted solely of the facts that the time set for Allis's appearance was March 6, 1974, at 1:15 p.m., and he did not appear until 1:35 p.m. on that date.

The majority correctly assumes that a finding of contempt under Rule 42(b) could not be sustained based only on evidence that a forgetful lawyer was 30 minutes late for a court appearance. The lawyer would be negligent, but his conduct could not be deemed a reckless disregard of his responsibilities as a lawyer nor a wilful disobedience of a court order. The majority concludes that Mr. Allis's unsworn statement that he had been late on some other unspecified occasion or occasions bridged the evidentiary gap. I do not

think that the informal exchange between the district court and Mr. Allis can be deemed evidence or even an admission in this Rule 42(b) context.

However, even if I thought that Mr. Allis's statement of previous tardiness was an adequate substitute for formal admissions or testimony, I cannot find that the procedural requisites of Rule 42(b) were met. "Although the 'simple notice' required by Rule 42(b) is to be judged with less strictness than a formal indictment [citations omitted], due process as well as the rule require that it contain enough to inform [the alleged contemnor] of the nature and particulars of the

contempt charged." (United States v. Robinson (9th Cir. 1971) 449 F.2d 925.) The informal statement from the bench did not meet the requirement of particularity. The district court noted that Mr. Allis was 30 minutes late on this occasion and that on some other occasions he had also been late. The "notice" specified no dates of the prior tardiness. Yet, the conduct on prior occasions was necessarily in issue. The informal notice thus did not meet the simple standards of Rule 42(b). (United States v. Robinson, supra.)

The time given within which to prepare a defense was patently inadequate. A ten-minute recess and a quick consultation with another lawyer is insufficient to permit a defense to

be made to a charge that Mr. Allis was habitually late or, at least had been late without justifiable excuse on other occasions. (See, e.g., United States v. Alter (9th Cir. 1973) 482 F.2d 1016, 1023.)

I am fully aware of the serious imposition upon the court, the litigants, and other participants in the judicial process that is caused by tardy lawyers. Concern about the problem and empathy for the exasperation of the court imposed upon must not blind us to violation of the Rules of Criminal Procedure. I cannot join in a memorandum properly rejecting the use of summary contempt under Rule 42(a) and approving procedures equally summary under Rule 42(b). The effect is

to reduce the nonsummary procedures of criminal contempt prescribed by Rule 42(b) to levels acceptable only under Rule 42(a).

I would vacate the contempt and remand the cause to the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE NICHOLAS R. ALLIS,) No. 74-1695
Appellant.)
) O R D E R

Before: HUFSTEDLER and SNEED, Circuit Judges, and THOMPSON*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: April 21, 1976

* The Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

APPENDIX B

Supreme Court, U. S.
FILED
SEP 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-1811

In the Supreme Court of the United States

OCTOBER TERM, 1976

IN RE NICHOLAS R. ALLIS, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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IN RE NICHOLAS R. ALLIS, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 531 F. 2d 1391.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction for criminal contempt was entered on March 10, 1976. A petition for rehearing was denied on May 13, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 14, 1976, and is therefore out of time under Rule 22(2) of this Court's Rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the district court's finding that an attorney was in contempt of court for tardiness in appearing at a hearing specially scheduled at the attorney's request.

2. Whether the contempt proceedings complied with the requirements of Fed. R. Crim. P. 42(b).

RULE INVOLVED

Fed. R. Crim. P. 42 provides:

> (a) **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner, defense counsel in a criminal case, was adjudged guilty of contempt of court and was fined $100 by Judge Irving Hill of the United States District Court for the Central District of California for tardiness in appearing in that court at a scheduled proceeding. The court of appeals affirmed, one judge dissenting (Pet. App. A).

On March 6, 1974, petitioner, a Deputy Federal Public Defender, failed to appear in court at the time set for the sentencing of a defendant whom he represented in a criminal case. When petitioner appeared in court approximately twenty minutes late, he acknowledged that the sentencing proceeding had been set at his special request, that he "had not been on time more than once heretofore in this court, and on at least one, if not all of those prior occasions, [was] admonished in the most strict terms that scrupulous promptness was a lawyer's obligation" (Pet. App. A-13 to A-14). The trial judge notified petitioner that he was "in imminent likelihood of being found in contempt," that he would be allowed reasonable time to consult with another attorney, that the court would declare a recess for the purpose, and that thereafter petitioner and his counsel would be heard (Pet. App. A-14). After a ten minute recess, petitioner appeared with the Federal Public Defender, who had entered the courtroom prior to the recess (Pet. App. A-14), and gave the following explanation for his late appearance at the scheduled proceeding (Pet. App. A-15 to A-16):

> Well, I don't really have an excuse, your Honor. It was my fault. I did forget it. I had it marked on my calendar. I went in with the file this morning to my secretary. I asked her to remind me of it.

> I spent the whole lunch hour up in my office preparing for the case in Judge Ferguson's court. I didn't think of this case during the noon hour like I thought of it when I came into the office this morning.
>
> And I left to go down to Judge Ferguson's court about 1:17, and I have been there sitting at the defense counsel table preparing that case since then.

The court thereupon asked the Federal Public Defender if he desired to be heard in any respect. The latter, after acknowledging that petitioner had previously been tardy in appearing before the same judge, stated that petitioner's tardiness was not intentional and that petitioner had been making conscientious efforts to be on time for court appearances (Pet. App. A-16 to A-18). The court, noting that petitioner had been given stern warnings, in the strongest terms possible, on more than one previous occasion, adjudged him in contempt of court and imposed a $100 fine (Pet. App. A-18 to A-20). Thereafter, the court filed a written order finding petitioner in contempt (R. 1-2).

On March 15, 1974, petitioner moved to vacate the contempt order (R. 3). In a supporting affidavit petitioner again recited that on the day in question he had asked his secretary to remind him of the appearance; he recounted in more detail the case that he had before Judge Ferguson, and he stated that his tardiness was not willful but was "the result of lapse of memory and preoccupation with another case" (R. 8). He said that during the week of July 17, 1973, Judge Hill had warned him about failing to appear or failing to appear on time and had offered him the choice of contempt or a $25 contribution to the library fund; and that on July 20, 1973, he had inadvertently missed an appearance in

another case but that another lawyer had appeared in his stead (R. 5-6).[1] He stated that on the occasion of his only tardiness out of sixteen appearances before Judge Hill between July 17, 1973, and March 6, 1974, he had advised the court clerk in advance that he would be late because of an appearance in another courtroom that had precedence (R. 6-7). This motion was denied by the district court.

ARGUMENT

1. The court of appeals correctly held that the evidence was sufficient to justify adjudging petitioner, an attorney, in contempt for tardiness. As it concluded: "A contempt is wilful disregard or disobedience of public authority and the requisite wrongful intent may be inferred from an attorney's reckless disregard of his obligations to the court" (Pet. App. A-5). An attorney, as an officer of the court, has an obligation to be punctual so as to avoid delays in the administration of justice in the courts and inconvenience to court personnel, litigants and witnesses, and other attorneys. Here, petitioner admitted in open court that he did not "really have an excuse" for failing to be on time at a proceeding specially set at a time requested by petitioner (Pet. App. A-15). He conceded his fault, explaining that he simply forgot about the appearance. He also acknowledged both in open court and in his written motion to vacate that this was not an isolated instance: he had been previously admonished by the same district judge some eight months earlier about a late appearance. On this record, the evidence is sufficient to support the finding of contempt. See *In re Niblack*, 476 F. 2d 930 (C.A. D.C.).

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[1] The court below was supplied a copy of the reporter's transcript of the proceedings in court which reflected these occurrences.

2. The procedure employed by the district court in its adjudication of contempt satisfied the notice and hearing requirements of Rule 42(b) of the Federal Rules of Criminal Procedure.[2] The district court notified petitioner orally, as the rule permits, that petitioner stood "in imminent likelihood" of contempt for his tardiness and that he had been admonished about tardiness on previous occasions. Unjustified tardiness by an attorney evidences a reckless or willful disregard of public authority. *United States* v. *Delahanty*, 488 F. 2d 396, 398 (C.A. 6); *Sykes* v. *United States*, 444 F. 2d 928 (C.A. D.C.). Therefore the notification constituted an adequate warning to petitioner that he faced punishment for a reckless disregard of his responsibility as an attorney if he failed to justify his tardiness. Nor was it necessary for the court to specify the prior occasions of tardiness in the notice, any more that it is necessary to allege the prior acts of misconduct used to prove the requisite intent to commit an offense charged in an indictment.

The district court also complied with the rule's requirement that the notice allow "a reasonable time for the preparation of the defense." As the court of appeals pointed out (Pet. App. A-9):

> The facts were clear and undisputed. At no time was an indication given of the availability of other witnesses or evidence to support a defense of justification or excuse.

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[2]Since the procedure satisfied Rule 42(b), it is not necessary to consider whether tardiness may be punished summarily under Rule 42(a). See *In re Gates*, 478 F. 2d 998 (C.A. D.C.); *In re Niblack*, *supra*. Cf. *United States* v. *Wilson*, 421 U.S. 309.

Significantly, petitioner made no request for an extension of time to obtain additional evidence, to review the law, or to obtain additional counsel. Indeed, while his motion to vacate gave an explanation regarding two specific occasions when petitioner appeared late or failed to appear before Judge Hill, it contained nothing inconsistent with petitioner's admission in open court that he was at fault and that on this occasion he simply forgot. His motion did no more than document his previously declared preoccupation with another case and his secretary's failure to notify him. Thus, in the circumstances of this case, petitioner was afforded a reasonable time to prepare his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
Attorney.

SEPTEMBER 1976.

DOJ-1976-09